

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CITIMORTGAGE, INC.,

Case No. 2:15-CV-154 JCM (VCF)

Plaintiff(s),

ORDER

v.

MDGGG TRUST,

Defendant(s).

Presently before the court is defendant MDGGG Trust's motion to dismiss plaintiff CitiMortgage, Inc.'s claims against it, as asserted in plaintiff's second amended complaint. (ECF No. 58). Plaintiff filed a response (ECF No. 71), and no reply was submitted.

I. Introduction

This litigation involves the circumstances regarding the May 28, 2014, foreclosure sale of the real property at 9680 Blue Calico Drive, Las Vegas, Nevada. (ECF Nos. 55, 71). The instant defendant is the purchaser of the property at that foreclosure sale. (ECF No. 55). As to this defendant, the second amended complaint asserts the following claims: (1) declaratory relief; (2) wrongful foreclosure; and (3) unjust enrichment.

II. Legal Standard

The court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although rule 8 does not require detailed factual allegations, it does require more than labels and conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, a formulaic recitation of the elements of a cause of action will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (citation omitted). Rule 8 does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. *Id.* at 678–79.

1 To survive a motion to dismiss, a complaint must contain sufficient factual matter to “state
 2 a claim to relief that is plausible on its face.” *Id.* A claim has facial plausibility when the plaintiff
 3 pleads factual content that allows the court to draw the reasonable inference that the defendant is
 4 liable for the misconduct alleged. *Id.* When a complaint pleads facts that are merely consistent
 5 with a defendant’s liability, and shows only a mere possibility of entitlement, the complaint does
 6 not meet the requirements to show plausibility of entitlement to relief. *Id.*

7 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 8 when considering a motion to dismiss. *Id.* First, the court must accept as true all of the allegations
 9 contained in a complaint. However, this requirement is inapplicable to legal conclusions. *Id.*
 10 Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*
 11 at 678. Where the complaint does not permit the court to infer more than the mere possibility of
 12 misconduct, the complaint has “alleged – but not shown – that the pleader is entitled to relief.” *Id.*
 13 at 679. When the allegations in a complaint have not crossed the line from conceivable to
 14 plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

15 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
 16 1216 (9th Cir. 2011). The *Starr* court held:

17 First, to be entitled to the presumption of truth, allegations in a complaint or
 18 counterclaim may not simply recite the elements of a cause of action, but must
 19 contain sufficient allegations of underlying facts to give fair notice and to enable
 20 the opposing party to defend itself effectively. Second, the factual allegations that
 21 are taken as true must plausibly suggest an entitlement to relief, such that it is not
 22 unfair to require the opposing party to be subjected to the expense of discovery and
 23 continued litigation.

24 *Id.*

25 **III. Discussion**

26 *a. Unjust enrichment*

27 As an initial matter, plaintiff cannot make a claim of unjust enrichment under its alleged
 28 facts against this defendant. “Unjust enrichment is the ‘unjust retention of a benefit to the loss of
 another, or the retention of money or property of another against the fundamental principles of
 justice or equity and good conscience.’” *Galvan v. J.C.H. Enters., Inc.*, 2011 WL 4501083, No.
 2:11-cv-00307-RLH-GWF, at *3 (D. Nev. Sept. 27, 2011) (quoting *Asphalt Prods. Corp. v. All
 Star Ready Mix*, 898 P.2d 699, 701 (Nev. 1995)). To state a valid claim for unjust enrichment, a
 plaintiff must allege three elements: (1) plaintiff conferred a benefit on defendant; (2) defendant

1 appreciated such benefit; and (3) defendant accepted and retained the benefit. *Id.* (citing *Topaz*
2 *Mutual Co. v. Marsh*, 839 P.2d 606, 613 (Nev. 1992)).

3 Regarding this defendant, plaintiff’s allegations under this claim are merely that “MDGGG
4 has accepted and retained the benefit of CMI’s payment of the property taxes assessed to the
5 Subject Property as well as the efforts to maintain and preserve the Subject Property.” (ECF No.
6 55 at 12). Plaintiff gives no indication of the pecuniary amount, applicable tax periods, the
7 authority delineating these obligations, a description of what these “efforts” entail, or any other
8 facts that would elevate this allegation above the status of a conclusory assertion. (ECF No. 55 at
9 12); *see Twombly*, 550 U.S. at 555. Therefore, this claim will be dismissed.

10 *b. Declaratory relief*

11 In its second amended complaint, plaintiff brings forth a claim for “declaratory relief.”
12 (ECF No. 55 at 6). Although plaintiff briefly appears to seek relief under the Fourteenth
13 Amendment of the United States Constitution in that portion of its second amended complaint,
14 defendant is correct that declaratory relief cannot be a cause of action by itself because the
15 Declaratory Judgment Act—cited in plaintiff’s operative complaint—“only creates a remedy.”
16 *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir.
17 1989); *see also* 28 U.S.C. § 2201; (ECF No. 55). Therefore, that claim, in its current form, will be
18 dismissed as to this defendant.

19 *c. Wrongful foreclosure*

20 This court notes that there is no indication on the record of this case that the parties have
21 completed the Nevada Real Estate Division’s (“NRED”) mediation program, as governed by
22 Nevada Revised Statute (“NRS”) 38.310.

23 Section 38.310 of the NRS provides, in relevant part:

24 No civil action based upon a claim relating to [t]he interpretation, application or
25 enforcement of any covenants, conditions or restrictions applicable to residential
26 property . . . or [t]he procedures used for increasing, decreasing or imposing
27 additional assessments upon residential property, may be commenced in any court
28 in this State unless the action has been submitted to mediation.
Nev. Rev. Stat. § 38.310(1). Subsection (2) continues, mandating that a “court shall dismiss any
civil action which is commenced in violation of the provisions of subsection 1.” Nev. Rev. Stat.
§ 38.310(2).

Subsection (1) of NRS 38.330 states that “[u]nless otherwise provided by an agreement of
the parties, mediation must be completed within 60 days after the filing of the written claim.” Nev.

1 Rev. Stat. § 38.330(1). However, while NRS 38.330(1) explains the procedure for mediation, NRS
 2 38.310 is clear that no civil action may be commenced “unless the action has been submitted to
 3 mediation.” NRS 38.310. Specifically, NRS 38.330(1) offers in relevant part:

4 If the parties participate in mediation and an agreement is not obtained, any party
 5 may commence a civil action in the proper court concerning the claim that was
 6 submitted to mediation. **Any complaint filed in such an action must contain a**
 7 **sworn statement indicating that the issues addressed in the complaint have**
been mediated pursuant to the provisions of NRS 38.300 to 38.360, inclusive, but
 an agreement was not obtained.

8 Nev. Rev. Stat. § 38.330(1) (emphasis added). Moreover, nothing in NRS 38.330 provides that
 9 NRED’s failure to appoint a mediator within 60 days constitutes exhaustion, nor does the statute
 10 place the burden on NRED to complete mediation within a specified period of time.

11 The record in this case indicates that the instant parties have not completed mediation.
 12 Thus, unless NRED appoints a mediator or the parties agree on one, plaintiff’s claims—those that
 are subject to NRS 38.310—are unexhausted under state law.¹

13 Further, “[a] wrongful foreclosure claim challenges the authority behind the foreclosure,
 14 not the foreclosure act itself.” *McKnight Family, L.L.P. v. Adept Mgmt.*, 310 P.3d 555, 559 (Nev.
 15 2013) (citing *Collins v. Union Fed. Sav. & Loan*, 662 P.2d 610, 623 (Nev. 1983)). “The material
 16 issue in a wrongful foreclosure claim is whether ‘the trustor was in default when the power of sale
 17 was exercised.’” *Turbay v. Bank of Am., N.A.*, No. 2:12–CV–1367–JCM–PAL; 2013 WL
 18 1145212, at *4 (quoting *Collins*, 662 P.2d at 623). “Deciding a wrongful foreclosure claim against
 19 a homeowners’ association involves interpreting covenants, conditions or restrictions applicable
 20 to residential property.” *McKnight Family, L.L.P.*, 310 P.3d at 559. “This type of interpretation
 21 falls under NRS 38.310.” *Id.* Additionally, NRS 38.310 applies to laws “contain[ing] conditions
 22 and restrictions applicable to residential property.” *Id.* at 558. Therefore, plaintiff’s claim of
 wrongful foreclosure must be mediated before this court may delve into its merits.

23 IV. Conclusion

24 In sum, defendant’s motion to dismiss succeeds as to each claim against it. This order does
 25 not close the case because the unjust enrichment claim is challenged here as to this defendant only.


26 . . .

27
 28 ¹ The statute of limitations for any claim submitted to NRED for mediation is tolled until
 the conclusion of mediation. *See* Nev. Rev. Stat. § 38.350.

1 Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that MDGGG Trust's motion
3 to dismiss (ECF No. 58) be, and the same hereby is, GRANTED.

4 DATED March 10, 2017.

5 
6 UNITED STATES DISTRICT JUDGE